SUPREME COURT, U.S.
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No. 92-1042

In the Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL COMMODITY AND BARTER ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court properly denied petitioners' motion to quash grand jury subpoenas directed at petitioners' business records and properly held petitioners in civil contempt for refusing to comply with the subpoenas.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A3) is unreported, but the judgment is noted at 972 F.2d 356 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on September 11, 1992. Pet. App. C1-C2. The petition for a writ of certiorari was filed on December 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners National Commodity and Barter Association (NCBA), National Commodity Exchange (NCE), and Executive Finance Company seek review of a court of appeals' decision affirming the orders of the United States District Court for the District of Colorado, in which the court refused to quash a series of grand jury subpoenas directed at petitioners' business records and held petitioners in contempt for refusing to comply with the subpoenas.

1. NCBA is a non-profit organization that advocates abolishing the Federal Reserve System and the Internal Revenue Service (IRS) and returning to a currency system based on precious metals. See *National Commodity & Barter Ass'n* v. *United States*, 951 F.2d 1172 (10th Cir. 1991) (*NCBA I*), *reprinted in* Pet. App. B1-B6. NCBA created NCE to serve as a "warehouse" bank, handling NCBA members' financial transactions such as check cashing, bill paying, and precious metal purchases. Pet. App. B2. Under that system, NCBA members would endorse third-party checks to NCE, which would then deposit the checks into one of the NCE accounts. NCE used the funds in the NCE accounts to pay members' bills and make other financial transactions, tracking members' individual balances through its own internal account numbers. Until 1988, NCE conducted its financial transactions through various bank accounts. In 1988, NCE closed those accounts and began using other institutions, such as Executive Finance Company and Extra Fast Cash (EFC), to convert members' checks into cash. *Ibid.*

In late 1989, a federal grand jury began an investigation into whether petitioners and others were violating federal currency transaction reporting statutes, 31 U.S.C. 5313 and 5324. As part of its investigation, the grand jury issued subpoenas to several Denver area banks seeking production of all records of open or closed bank accounts in the name of or controlled by NCBA, EFC, and several NCBA members. NCBA, NCE, and EFC moved to quash the subpoenas on the ground that production of the bank records would necessarily reveal the names of NCBA members, thereby interfering with the NCBA members' First Amendment right to freedom of association. The district court found that petitioners had made a prima facie showing that compliance with the subpoenas would infringe their First Amendment rights and ordered an evidentiary hearing. Pet. App. B2-B3.

At the hearing, IRS Special Agent Michael Herrera testified about a transaction by an undercover government agent posing as an NCBA/NCE member. The agent sent a check for $11,796 to NCE and received by return mail two packages of cash, each containing $5,666. In addition, Paul Carter, who operated EFC, testified that he used EFC accounts to convert NCBA members' checks to cash, returning the cash to NCBA. He testified that when completing currency transaction reports (CTRs), see 31 C.F.R. 103.22, he identified NCBA as the recipient of the cash, knowing that the cash was actually destined for individual NCBA members. The government also presented evidence obtained from postal insurance forms indicating that NCBA or NCE had made more

than 1000 insured mailings containing more than $2.7 million in cash. See Gov't C.A. Br. Add. 5-6.

On May 17, 1990, the court denied the motion to quash. The court held that the government had demonstrated a compelling need for the records, the records bore a substantial relationship to the investigation, and the information could not be obtained through less intrusive means. Pet. App. B3. The court of appeals affirmed, rejecting petitioners' argument that the subpoenas violated NCBA members' First Amendment rights. *Id.* at B3-B6. It declined to decide petitioners' challenge to the constitutionality of 31 U.S.C. 5313 and 5324 as applied to them, concluding that the challenge was premature. Pet. App. B5.

2. Shortly after the district court denied the motion to quash the bank subpoenas, a federal grand jury investigating NCBA's private banking system served subpoenas on NCBA, NCE, Executive, and Paul Carter, directing them to produce certain business and financial records. Gov't C.A. Br. 1-2. Petitioners and Carter moved to quash the new subpoenas on the ground that the subpoenas violated the First Amendment right to freedom of association, contending once again that the currency transaction reporting statutes were unconstitutional and that the subpoenas were overbroad.

On August 27, 1990, after another evidentiary hearing, the district court denied petitioners' motion to quash and ordered them to comply. The court concluded that the new subpoenas did not violate the right to freedom of association, that the subpoenas were not overbroad, and that petitioners' constitu-

tional challenge to the statutes was premature. The court subsequently found petitioners in civil contempt and ordered them collectively to pay $50 per day, beginning August 27, 1990, until they complied with the subpoenas. See Pet. Supp. App. E1-E4. The court of appeals affirmed. Pet. App. A1-A3.

ARGUMENT

Petitioners challenge the court of appeals' decision on the ground that it allows the government to compel production of petitioners' business records "in violation of the First Amendment freedom to engage in anonymous association." Pet. 11. The courts below correctly rejected that argument, holding that the government had "met its burden of demonstrating a substantial relationship between the subpoenaed records and its compelling interest in the criminal investigation." Pet. App. A3, B5.

1. Petitioners contend at the outset (Pet. 13-17) that the grand jury subpoenas should be quashed because the First Amendment exempts petitioners' operations from the federal currency transaction reporting statutes that provide the basis for the criminal investigation, 31 U.S.C. 5313 and 5324. As the court of appeals explained, petitioner cannot foreclose a grand jury investigation by preemptively attacking the laws that provide the basis for the investigation on the ground that those laws would be unconstitutional "as applied" to them. Pet. App. B5.

The grand jury is conducting an investigation into possible violations of the currency transaction reporting statutes, and the courts have concluded that the information sought by subpoena is needed to complete the investigation. If the grand jury returns

an indictment, petitioners will then have ample opportunity to attack the constitutionality of the statutes as applied to them. Until that time, however, petitioners' claim that they are constitutionally exempt from currency transaction reporting statutes is premature. See, *e.g.*, *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 213-214 (1945) (courts "will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied"); *ACORN* v. *City of Tulsa*, 835 F.2d 735, 744 (10th Cir. 1987); *Kines* v. *Day*, 754 F.2d 28, 31 (1st Cir. 1985).* Moreover, disruption of the orderly progress of grand jury proceedings, in order to adjudicate such prematurely asserted claims, would be especially inappropriate. See generally *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974).

2. Petitioners also contend that the breadth of the government's inquiry will infringe the rights of their members to "anonymous association." Pet. 11, 17-19. As this Court has explained, the right to associate for expressive purposes is not absolute. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984). The government may compel disclosure of membership

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* Petitioners argue (Pet. 13-14) that the Ninth Circuit's decision in *Gaudiya Vaishnava Society* v. *City & County of San Francisco*, 952 F.2d 1059 (1991), cert. denied, 112 S. Ct. 1951 (1992), which exempted certain non-profit sales activity from a city ordinance, supports their constitutional argument. That decision, however, did not involve a grand jury investigation, nor does it allow a premature "as applied" challenge to the statutes that provide the basis for the investigation.

information, even when that information is presumptively entitled to First Amendment protection, if it can show that the information sought to be disclosed bears a substantial relationship to a compelling governmental interest. *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958).

The court of appeals has twice held in this case that the government has a compelling interest in conducting its good faith criminal investigation into whether NCBA is using its private banking system to evade federal currency transaction reporting requirements. See Pet. App. A2-A3, B4. See also *First Nat'l Bank* v. *United States Dep't of Justice*, 865 F.2d 217, 220 (10th Cir. 1989); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988). The subpoenaed documents are substantially related to that compelling interest, because it is only through analysis of the NCBA/NCE financial records that the government can determine whether the currency transaction reporting requirements have been violated. See Pet. App. B5.

The subpoenas are not overbroad in light of the inquiry the government must make. The government's subpoenas seek a broad variety of information, but that is "due to the complex nature of the United States financial system and the numerous ways money can be moved within it." Pet. App. B5. Contrary to petitioners' arguments below, the government is not limited to records involving transactions of more than $10,000 on any given day. Section

5324 can be violated by structuring a transaction to take place over a longer period of time, and the grand jury must have sufficient information to determine whether that has occurred here. See, *e.g.*, *United States* v. *Brown*, 954 F.2d 1563, 1565-1566 (11th Cir.), cert. denied, 113 S. Ct. 284 (1992); *United States* v. *Nall*, 949 F.2d 301, 306-308 (10th Cir. 1991); *United States* v. *Scanio*, 900 F.2d 485, 491-492 (2d Cir. 1990). See also S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986).

3. Petitioners contend (Pet. 19-22) that the district court erred in finding them in civil contempt under 28 U.S.C. 1826. They argue that they demonstrated "just cause" for their failure to comply with the subpoenas. Petitioners base their claim of "just cause" on the assertion (Pet. 21) that the government failed to show a nexus between the undercover agent's transaction with NCE and the conduct of the affairs of NCBA and NCE as a whole. That assertion provides no basis for a finding of "just cause." Petitioners have been ordered to produce subpoenaed documents, and despite that order they have refused to comply. Pet. App. A2. The district court and the court of appeals properly held in response to petitioners' motion to quash that the government had demonstrated its entitlement to those documents. *Id.* at A2-A3. Petitioners' "just cause" contention is simply an improper attempt to relitigate a question that has been correctly decided against them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

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